U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 25May2001

Date Issued:

Case No.: 2000-LHC-1955

OWCP No.: 10-37118

In the Matter of

ROBERT A. MACHER,

Claimant

v.

JACK GRAY TRANSPORT,

Employer,

and

STERLING ADMINISTRATIVE SERVICES,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

Thomas Lenz, Esq.
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For the claimant

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Chicago, Illinois 60606

For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, [33 U.S.C. § 901 *et seq.*], hereinafter referred to as the Act. The case was referred to the Office of Administrative Law Judges on April 28, 2000. (ALJX 1).

Following proper notice to all parties, a formal hearing was held on July 20, 2000, in Chicago, Illinois. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant, and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

ISSUES

The only questions remaining for resolution relate to the nature and extent of claimant's disability resulting from his work-related injury and the date he reached maximum medical improvement.

FINDINGS OF FACT

Background

The claimant, Robert Macher, is 31 years old and has been a crane operator in maritime commerce since November 1990.

Mr. Macher is a high school graduate and has completed an apprenticeship program in the Local 150 Union of Operating Engineers. The apprenticeship program involved 6,000 hours of on the job training, 80 hours of classroom time, 64 hours of on the site training and 3 proficiency tests on the equipment. Mr. Macher completed proficiency tests on the forklift, friction crane, and the hydraulic crane. He was a journeyman for five years. After becoming a journeyman, he worked mainly on friction cranes. The claimant began working for Jack Gray Transport in the Port of Indiana in November 1990 and was paid $29.85 per hour. As a crane operator he was paid a higher wage than operators of other types of equipment due to the increased responsibilities associated with crane operation. (Tr. 23, 25, 28-30).

While working for the employer, the claimant operated mainly Manatowk 4600 series 3 or 4 cranes, which are friction cranes. A friction crane works like the brakes on a car. When the operator presses the brake, the faster the crane's load is lowered. A hydraulic crane differs in that a lever is used to lower and raise the crane's load. (Tr. 32). Around the time of the injury involved in this case, Mr. Macher was operating a 400 ton capacity crane, which was the largest friction crane at the site where the claimant worked. Mr. Macher's job duties as an "oiler" involved climbing on the cranes, greasing the cranes, and performing maintenance. Performing these duties required lifting of 50-70 pounds. (Tr. 33).

On January 22, 1998, the claimant began working at 7:00 in the morning, changing the oil on the crane on which he was working. This process usually takes all day due to the large amount of oil that is required for the cranes. During clean up, Mr. Macher attempted to remove a 55 gallon drum, which weighs approximately 250 to 350 pounds, from underneath the crane by rolling it on the barrel's edge. However, the claimant slipped on some ice and fell forward toward the barrel as it rolled back to its upright position, dragging him with it. (Tr. 34-35). At this instance, Mr. Macher felt a pinch in his back. He finished putting up the oil barrel and went home. After taking a hot shower, his back began to stiffen and he felt extreme pain in his lower back all the way down to his feet. (Tr. 39-40).

The following morning, the claimant went to Dr. Charles Hagenow, a colleague of his family physician, Dr. Kenneth

Shively. Mr. Macher has had no prior work-related injuries and the only other time he has had back problems was on New Year's Eve 1994, when he strained his lower back at a party. (Tr. 31). Dr. Hagenow prescribed Valium and Darvocet for the work-related injury and told Mr. Macher to go home and rest. The next day, claimant reported the accident when he arrived to work. The claimant worked for two days following his injury, but the pain returned and he again visited with Dr. Shively. The physician gave him a steroid pack and told him to continue to rest.

Mr. Macher continued to follow up with either Dr. Hagenow or Dr. Shively on several occasions. After Mr. Macher went to therapy, Dr. Shively stated that the claimant was able to return to work on March 9, 1998. The claimant did return on that date, only to work a few hours and again experience back pain.

Dr. Shively referred Mr. Macher to Dr. Mark Wasylenko at Lakeland Orthopaedics. Dr. Wasylenko examined Mr. Macher on March 24, 1998. He diagnosed the claimant with mechanical back pain, noted no evidence of sciatica and told him to remain off work for two more weeks. (CX 4). That physician recommended home exercise and stretching. (Tr. 41-44; CX 4). In April of 1998, Mr. Macher returned to Dr. Shively, who found the claimant's flexion and extension of the lumbar spine were essentially normal. (CX 1, A1-A7).

Mr. Macher was next examined at the request of the employer/carrier by Dr. Stephen Ribaudo on April 17, 1998. The physician noted the claimant was suffering from pain in the back shooting down his right side into his foot. (CX 6, F1). Initially, Dr. Ribaudo noted that Mr. Macher came in with back pain in the lumbar region that radiated down to his right knee with episodic numbness and tingling. Dr. Ribaudo noted no prior history of lower back pain. He reviewed the x-rays of Mr. Macher's spine and opined that he had a lumbosacral sprain and right sciatica. Dr. Ribaudo suspected a disc herniation, either at L4/5 or L5/S1 with right L5 nerve root compression. At this point, the physician recommended an MRI (magnetic resonance imaging) of his spine. Dr. Ribaudo stated that the claimant should not work until the end of the month and should continue on Duract medication and was given Norflex medication to try. (CX 6).

Two MRI reports from the Magnetic Resonance Imaging Center are part of the record. The first MRI scan of the lumbar spine without contrast was performed on April 24, 1998. This test was interpreted by Dr. P. Miro and showed minimal degenerative loss of signal at L5/S1, but was otherwise normal. (CX 7, G1).

Mr. Macher returned to Dr. Ribaudo for a follow up visit on April 30, 1998. The claimant noted that he was feeling better. Dr. Ribaudo reported the MRI results showed little, but noted an annular tear of the L5/S1 with some bulging and loss of signal intensity in T2 with no serious stenosis centrally or laterally. Dr. Ribaudo did note a lesion at L5/S1. The physician indicated that the claimant was doing well with conservative treatment. In May 1998, Mr. Macher had continued to experience lower back pain and right lower extremity numbness. At this time, Dr. Ribaudo also recommended an EMG of the claimant's right lower extremity.

A functional capacity evaluation was performed on the claimant on May 12, 1998. This evaluation was completed by Sheri Swaim, OTR/L. Mr. Macher had been diagnosed with annular tear of L5/S1, bulging noted, and right sciatica. Ms. Swaim noted poor standing tolerance based on the fact that the claimant could only stand 10 minutes without experiencing pain. She indicated that he should avoid twisting, bending, kneeling, and climbing and should only lift up to 20 pounds. Ms. Swaim also noted that his pushing and pulling should be a minimum with resistance of only up to 20 pounds. In addition, she stated Mr. Macher should not work on vibratory or jarring machines and should only lift light objects. (CX 6, F4).

Dr. Ribaudo finally released the claimant to light duty work on May 18, 1998. (CX 1, F1). Mr. Macher explained that this work included running equipment, such as air compressors, dewatering pumps, welding machines and elevator. (Tr. 50).

Claimant returned to Dr. Ribaudo in June of 1998 for a follow-up. He reported that he had been working twelve hour shifts for seven days a week. A nerve conduction examination was performed on June 2, 1998 and an electrodiagnosis report of the examination is contained in the record. The results were interpreted by Dr. Ribaudo and he indicated that the tests show denervation confined to the right L5 and potentially, the right S1 nerve root distributions, assumed second-

ary to L5/S1 disc lesion. (CX 6, F2). The physician stated the patient was probably overdoing it at work. (CX 6, p. 24).

Mr. Macher subsequently underwent a series of epidural blocks for his back pain in June of 1998. After the first epidural, Mr. Macher noted improvement, but in about 10 days, his sciatica returned. Dr. Ribaudo referred Mr. Macher to the University Medical Center Spinal Surgery Department and was told to see Dr. Christopher Dewald. Dr. Ribaudo told the claimant to stop therapy and to stay on light duty at work. (CX 8, H1-H2). Dr. Dewald subsequently recommended that Mr. Macher continue with physical therapy and he prescribed some anti-inflammatory medication and sent him for a second MRI. (Tr. 51-52).

The employer/carrier requested that the claimant be examined by another physician. On September 28, 1998, Mr. Macher was examined by Dr. John F. Shea, a board-certified neurological surgeon. Dr. Shea noted that Mr. Macher had been rolling a barrel of oil when he slipped on ice and the barrel was leaning toward him, when he felt a pinch in his back. Dr. Shea reiterated the claimant's previous treatment he had received from Drs. Shively and Ribaudo. He stated that Mr. Macher had no previous back problems. Dr. Shea listed the claimant's symptoms as pain in the low back and numbness in his right foot. He reported that Mr. Macher also indicated to him that he could walk only a half of a block, but was able to drive and put on socks and shoes. He also complained that coughing, sneezing, and straining bothered his back and that sitting and standing were the worst. The claimant stated that on a scale of 1-10, his pain was at an 8. The physician noted a work history as a heavy equipment operating engineer for 15 years and that the claimant was currently performing light duty work.

Dr. Shea performed an x-ray, an EMG nerve conduction, and an MRI on the claimant. The physician stated that the neurological examination revealed the pin was intact, vibration was decreased at the level of L4 and S1 on the right and S1 on the left. He noted no atrophy upon measurement of wrists, forearms, arms, calves, and ankles. Standing revealed Mr. Macher's spine was straight and Dr. Shea noted no spasm in the lumbar spine. He noted a non-neurological gait. The physician stated that he reviewed various medical records and that the April 24, 1998 MRI appeared to be normal, but it did reveal early degenerative changes on the right. He also

reported that the functional capacity evaluation performed on May 12, 1998 indicated that Mr. Macher's physical abilities were limited. Dr. Shea reported that the claimant had no prior conditions contributing to his diagnosis and that Dr. Shively released him to work full duty on March 9, 1998. Dr. Shea opined that the x-ray showed normal disc space narrowing, and there is no evidence of sciatica. He indicated that the MRI report showed no focal herniations, no significant bulges, no evidence of central stenosis, and no annular tear. The physician opined there was no need for further diagnostic testing, pain medication or physical therapy, or any further neurological or orthopaedic medical treatment. Dr. Shea found that Mr. Macher could return to crane operating with no restrictions. The physician noted an objectively normal neurological examination and that the claimant should have excellent prognosis. He opined that the claimant had reached the point of maximum medical improvement. (EX 1).

In the spring of 1999, Mr. Macher was still having pain in his back. He went back to Dr. Ribaudo. He was still taking Celebrex, Valium, Vicodin, Darvocet and Axid. He was referred to occupational therapy which he underwent on April 28, 1999. The therapist recommended that the patient undergo therapy twice a week for 10 visits. In May 1999, Mr. Macher experienced a flare up with his back pain again. However, in June 1999 he was back at baseline, had mastered the exercise program and was discharged from occupational therapy. On June 11, 1999, Mr. Macher's occupational therapist indicated that he had reached the point of maximum medical improvement, but she recommended that he continue exercising. Mr. Macher was discharged from occupational therapy on July 26, 1999. (CX 6, F3). Dr. Ribaudo also told Mr. Macher on June 11, 1999 to continue exercising at least three times a week. He also informed him that he was restricted from crane operating and that he may never return to that type of work. (CX 6, F1).

In July 1999, the claimant was continuing on light duty work and indicated to Dr. Ribaudo that he would like to work overtime. Dr. Ribaudo indicated on July 23, 1999 that Mr. Macher could now work overtime, but only doing light duty work. (CX 6, F1). At a follow up visit on October 7, 1999, Dr. Ribaudo reported that the claimant still had a certain amount of muscle spasm evident and he noted the right sciatic notch was sensitive. The physician also stated that the EMG showed nerve damage and suggested that a repeat MRI be performed. (CX 6, F1).

A second MRI was performed on the lumbar spine without contrast on October 18, 1999. This test was interpreted by Dr. Victor F. Jones and showed minimal degenerative disc change at L5, minimal swelling of the right L5 ganglion, etiology of the nerve uncertain. Dr. Jones further stated that there was no evidence of disc herniation or significant stenosis along the course of the nerve. An MRI of the thoracic spine without contrast was also performed, but was interpreted as normal. (CX 7, G2). Following the second MRI, Dr. Ribaudo reported on October 25, 1999 that Mr. Macher was not a surgical candidate and that he continues to work without interruption. He again noted minor disc degeneration, but noted the thoracic study was normal. (CX 6, F1).

In November 1999, the claimant continued to have episodic severe nerve pain and numbness in the right lower extremity. Dr. Ribaudo listed decreased temperature perception in the right posterior calf and indicated the right sciatic notch is still sensitive to palpation. The physician stated Mr. Macher is quite functional, but that he should continue with conservative treatment. The claimant had another flare up with his back problems in March of 2000. He had a repeat x-ray performed and was told by Dr. Ribauldo to continue with medication. His work restrictions were renewed at that time. (CX 6, F1).

The record also contains a report from Radiology, Inc. On March 28, 2000, Dr. Timothy Kadlecek produced a report of the lumbar spine and noted no evidence of acute fracture or subluxa- tion, no acute osseus pathology of the lumbar spine. (CX 10).

Dr. Ribaudo, who is a board-certified psychiatrist specializing in physical medicine and rehabilitation, testified by deposition on June 12, 2000. The physician indicated that he first saw Mr. Macher on April 17, 1998 on a referral and was asked to provide an opinion as to what was causing the claimant’s back problems. Dr. Ribaudo reiterated his previous findings and noted that after performing spinal, neurological, musculoskela- tal and vascular examinations, he found the claimant had decreased temperature discrimination in the right L5 nerve root dermatome. He also indicated that his right thigh and calf were less in circumference than his left, but that Mr. Macher had corrected this through exercise. (CX 14, p. 7-9).

Dr. Ribaudo also noted the EMG showed an irritated nerve root. He explained that Mr. Macher's restrictions were based on the claimant's symptoms of low back pain and sciatica. He recommended not sitting, standing, or walking for long periods of time without a break. He explained that prolonged sitting may cause vibration or shock to the spine. He also noted that Mr. Macher should avoid lifting heavy weights and that he should not do repetitive bending, twisting, or stooping. (CX 14, pp. 14-16).

Dr. Ribaudo also testified that he referred the claimant to Dr. Dewald at the spinal surgery department at Rush Presbyterian, but that physician could not explain Mr. Macher's sciatic nerve pain nor did Dr. Dewald find signs of stenosis of the spine. Dr. Ribaudo testified that Dr. Dewald did not recommend surgery. (CX 14, pp. 20-21).

Dr. Ribaudo also testified that a second MRI performed on October 18, 1999 showed a minimal loss of signal intensity at L5/S1 level which suggested potential mild dehydration of cartilagious tissue and a degenerative disc condition. He noted swelling around the L5 nerve root ganglion. Dr. Ribaudo opined that this may be a benign tumor. (CX 14, p. 21-22).

The physician further testified that on June 11, 1999 the claimant was back at baseline and that he had reached his best potential from working with an occupational therapist and by doing regular exercise. Hence, Mr. Macher had reached the point of maximum medical improvement. Dr. Ribaudo noted the claimant could not return to crane operation due to the heavy vibration involved with that job. (CX 14, p. 25-27).

Dr. Ribaudo stated that as of March 2000 the claimant was unable to stand or walk more than two hours at a time, that he could not drive more than three hours without stretching, frequent to occasional lifting of 20 pounds was permissible, that he should avoid using right lower extremity for machinery that had foot controls, and that he should avoid bending, squatting, kneeling or climbing. (CX 14, pp. 30-31). However, Dr. Ribaudo admitted that he could never fully demonstrate what was causing the claimant's back problems. Further, he stated that no functional capacity evaluation had been performed since May 1998. (CX 14, pp. 31, 45).

Dr. Shea also testified by deposition on August 2, 2000. He stated that he reviewed Dr. Ribaudo's deposition testimony

in addition to the other medical evidence of record. The physician reiterated his findings from his September 28, 1998 examination. He restated the methodology which he used during his examination. In Dr. Shea's opinion, Mr. Macher has degenerative disc disease at L5/S1 and that he objectively had a normal neurological examination. The physician felt that he could return to work as a crane operator with no restrictions. (EX 2, pp. 5, 10-11).

The physician also testified that he sees no evidence of focal disc herniation and no evidence of impingement upon the nerve. He further stated that no other doctors who examined Mr. Macher found L5 radiculopathy. Dr. Shea stated that he would not give Mr. Macher the same restrictions that Dr. Ribaudo placed on him. He explained that to diagnose a claimant's work restrictions, one should perform a neurologic evaluation, review radiology records, possibly a functional capacity evaluation, and B2000 or dynametric to scientifically determine whether the person is giving full effort. (EX 2, pp. 12-14).

Dr. Shea opined that Mr. Macher was at the point of maximum medical improvement on September 28, 1998. Upon review of the MRI evaluations, Dr. Shea found no lesions on Mr. Macher's spine. He explained that a lesion is not usually used to describe degenerative disc disease. He indicated that if a person had a disc protruding in the center, then both the right and left nerve roots may be affected, but that is very uncommon. Dr. Shea stated that Mr. Macher did not have a centrally herniated disc. (EX 2, pp. 17-19).

This physician also testified that upon his examination of the claimant, Mr. Macher stated that he wanted off of the heavy painkillers which he was currently taking. In a straight leg test, which is when a person lifts both legs at right angles in the same position away from the body in order to evaluate the sciatic nerve stretch, the physician noted Mr. Macher had a negative straight leg test, which showed he had no signs of sciatica. (EX 2, p. 20). The physician indicated that the functional capacity evaluation performed in May 1998 appeared to be valid. (EX 2, p. 21). He further testified that there is no way to tell when the degenerative changes in Mr. Macher's back occurred. His opinion is that the patient had narrowing at the L5/S1 level, which appeared on a routine x-ray and that this predisposes him to degenerative disc disease at that level. (EX 2, p. 23).

The physician disagreed that the EMG results showed denervation in the muscle supplied by L5/S1. He found no evidence of denervation at the L5/S1 level, but explained that it is not uncommon that he wouldn't find what an EMG would show. However, based upon his review and examination, he placed no restrictions on the claimant. (EX 2, pp. 23-24).

Dr. Shea opined that the claimant's job as a crane operator would involve moving the crane around to move objects that have to be lifted from one place to another. He believed that this job would require eight hours of sitting per day, with generally no breaks. He further stated that an oiler would generally do crane maintenance, but if a crane operator were required to do maintenance, he or she would then be required to lift and bend. Despite his estimation of the claimant's job duties, he never specifically learned exactly what Mr. Macher's job entailed. (EX 2, pp. 25-28).

The physician further indicated that Mr. Macher's degenerative disc disease was indeed aggravated by moving the barrel on January 22, 1998. (EX 2, pp. 31, 34). Dr. Shea also admitted that the claimant's flexion tests of the low back showed Mr. Macher had a forward flex of 16 degrees and that a normal score is 60 degrees. He also stated that the claimant had side flexion of 6 degrees, normal being 20-25 degrees, and an extension of 10 degrees, a normal score being 20-25 degrees. The physician opined that these test were normal due to the fact that no spasm was noted during the tests. (EX 1, EX 2, pp. 36-37).

Mr. Macher has been working in alternate employment since at least August of 1998. (ALJX 4; Tr. 50-51). He has mainly worked for Slurry Systems, where he runs a vibratory hammer. Also, he has worked for Walsh Construction where he runs light equipment, such as pumps. These job responsibilities require him to do lots of walking as well as carrying and moving pumps and lights to where they are needed. (Tr. 57-58). His earnings record also documents employment with other companies. (CX 12). He testified that he has not turned down any work since returning to alternate employment. (Tr. 59). At the time of the hearing, Mr. Macher had been most recently working strike duty for his Local 150 union. (Tr. 24).

The parties agree that the claimant's average weekly wage at the time of the January 22, 1998 injury was $1,721.26. (Tr. 18). However, this exceeds the maximum average weekly

wage of $1,253.65 as determined by the U.S. Department of Labor (DOL) for the period October 1, 1997 and September 30, 1998. The maximum compensation rate for disability under the Act for injuries occurring during that time period has been determined by DOL to be $835.74 per week. Mr. Macher was paid the following amounts of compensation in alternate employment for the hours indicated for the period September 1, 1998 through June 10, 1999:

Period (Weeks)	Hours Paid	Compensation Paid
Sept. 1-Sept. 28 (4 weeks)	58½	$ 1,501.80
Sept. 29-Oct. 26 (5 weeks)	0	0
Oct. 27-Nov. 30 (5 weeks)	128	3,657.60
Dec. 1-Jan. 4 (5 weeks)	32	817.60
Jan. 5-Feb. 1 (4 weeks)	90	2,540.30
Feb. 2-Mar. 1 (4 weeks)	72	1,764.00[1]
Mar. 2-Mar. 29 (4 weeks)	104[2]	2,566.20[3]
Mar. 30-Apr. 26 (4 weeks)	72[4]	1,688.40
Apr. 27-June 7 (6 weeks)	50	1,372.55
June 8-June 10 (3 days)	--	--[5]

[1]Salary computed for 8 hours on March 1 at the rate of $24.50 based on calendar submitted by claimant showing 8 hours of work on this date with Salyer Plumbing Co. and earning records from that company showing Mr. Macher was twice paid gross wages of $784.00 for 32 hours ($784 ÷ 32 = $24.50 per hour). (CX 12, L7, p. 22; CX 12, L8, p. 25).

[2]Calendar submitted by claimant shows 32 hours of work for Salyers Plumbing Co. from March 2 through 5. (CX 12, L8, p. 24).

[3]In the absence of earnings records of Salyer Plumbing Co. for 32 hours from March 2-5, claimant's gross wages for these dates were computed at $24.50 per hour equaling $784.00. Balance paid by Atlas Excavating, Inc. (CX 12, L8, p. 25).

[4]Eight hours listed on claimant's calendar for March 31 not included because earnings record from this company was not offered in evidence. (CX 12, L8, p. 24).

[5]Claimant's calendar shows 24 hours of work with Gatlin Plumbing and Heating, Inc., but earning statement is illegi-

TOTALS (41 weeks + 3 days)	606½	$15,908.45

(CX 12, L1-L12).

The documentary evidence in the record does not prove the total hours worked and compensation received by Mr. Macher between June 11, 1999 and May 31, 2000. (CX 12). Some of the claimant's wage records are illegible (CX 12, L11, p. 36; L12, p. 40; L15, p. 49), while others are incomplete. (CX 12, L17, pp. 56-57; L19, pp. 63-64; L21, pp. 70-71). Mr. Macher also earned wages during five weeks in this time period which exceeded the maximum average weekly wage determined by DOL pertaining to the date of the claimant's injury. (CX 12, L12, pp. 39-40; L13, p. 43; L16, pp. 52-53; L18, pp. 60-61; L22, p. 73). Mr. Macher received wages exceeding $8,000.00 in July of 1999 and $5,000.00 in November of that year. (CX 12, L 12, pp. 39-40; L16, pp. 52-53).

CONCLUSIONS OF LAW

Nature and Extent of Disability

Under the Act, a claimant has the burden of establishing the nature and extent of the injury. *See Trask v. Lockheed Shipyard Contr. Co.,* 17 BRBS 56, 59 (1980). This burden requires the claimant to put forth evidence sufficient to establish a prima facie claim for compensation. To meet this burden, the claimant must first demonstrate that he suffered an injury. Next, the claimant must produce evidence establishing that his working conditions could have caused his injury. *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Worker's Compensation Programs, U.S. Department of Labor,* 455 U.S. 608, 615 (1982).

The Act provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. § 920(a). This Section 20(a) presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury.

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ble. (CX 12, L11, p. 36).

Golden v. Eller & Co., 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990).

In order to be entitled to the Section 20(a) presumption, the claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. The Supreme Court has held that a *prima facie* claim for compensation, must at least allege an injury that arose in the course of employment as well as out of employment." *United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor,* 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), *rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.,* 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *Id.* The presumption, though, is applicable once claimant establishes that he has sustained an injury. *Preziosi v. Controlled Industries*, 22 BRBS 468, 470 (1989). Further, if a claimant's employment aggravates a non-work related underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. *See Gardner v. Bath Iron Works Corp.*, 11 BRBS 556, (1979), *aff'd sub nom Garner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

I find that Mr. Macher has established a *prima facie* case which invokes the Section 20(a) presumption in this case. The claimant indicated that he felt a pinch in his back on January 22, 1998 upon the moving of a 55 gallon drum filled with oil. The employer does not contest that this occurred. Further, even Dr. Shea admitted that the claimant had degenerative disc disease and that it was indeed aggravated by the moving of the barrel on the date of his injury. (EX 2, p. 34). Thus, I find that Mr. Macher has established a *prima facie* claim for compensation. Hence, the Section 20(a) presumption has been invoked.

To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP,* 619 F.2d 38 (9th Cir. 1980); *Ranks v. Bath Iron Works*

Corp., 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain, the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (lst Cir. 1982); *MacDonald v. Trailer Marine Transport Corp.,* 18 BRBS 259 (1986).

The employer offers no evidence that Mr. Macher's injury on January 22, 1998 was not related to his employment. Dr. Shea admitted that on January 22, 1998 the claimant aggravated a pre-existing degenerative disc disease. Thus, I find that the employer fails to rebut the Section 20(a) presumption and therefore, I find that the injury involved in this case arose out of the claimant's employment with Jack Gray Transport. The nature and extent of the claimant's disability must next be addressed.

Mr. Macher seeks temporary partial disability benefits from September 1, 1998 through June 11, 1999, the date claimant alleges he reached the point of maximum medical improvement. *See* 33 U.S.C. § 908(e). As noted above, the evidence establishes that claimant sustained an injury, as defined under the Act, to his back arising from his employment with Jack Gray Transport. Therefore, the primary issue remaining for resolution is the nature and extent of any disability that is caused by his injury.

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985); *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). A claimant establishes a *prima facie* case of total disability by showing that he cannot perform his usual work because of a work-related injury. The claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Once a *prima facie* case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternate employment. *See Turner*, 661 F.2d at 1038; *Trans-State Dredging v. Benefits Review Bd. [Tarner]*, 731 F.2d 199, 200-02 (4th Cir. 1984); *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 92 (1984). If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total. However, the claimant may rebut the employer's showing of suitable alternate employment, and thus retain entitlement to total disability benefits, by demonstrating that he diligently sought but was unable to obtain such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 305, 312 (D.C. Cir. 1991).

I initially conclude that Mr. Macher has successfully established a *prima facie* case. As noted above, the claimant's subjective complaints of pain may be enough to meet the burden of establishing a *prima facie* case of total disability. From the day of the incident until the present time, Mr. Macher has continued to complain of back pain, in addition to other symptoms, such as sciatica. Further, the claimant attempted to return to his job as a crane operator which required bending, lifting up to 50 to 70 pounds, climbing, and extended periods of sitting. However, he experienced great pain only a few hours after his return to work. Dr. Ribaudo, who treated the claimant on several occasions, indicated that Mr. Macher could not perform the work of a crane operator and

that the claimant may never return to that type of work. (CX 6, F1).

I give Dr. Ribaudo's opinion great weight based on the fact that he treated Mr. Macher on several occasions over a period of two years. As a trier-of-fact, in weighing and evaluating all of the evidence of record, I may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT) (2nd Cir. 1997). Dr. Ribaudo's opinion was shared by the physical therapist who performed the functional capacity evaluation. She also indicated that Mr. Macher should avoid bending, twisting or lifting more than 20 pounds. Dr. Dewald also indicated that although he saw no reason for the claimant's continued pain, Mr. Macher should remain on light duty work. Taken together, I find that these professional opinions, in addition to Mr. Macher's subjective complaints of pain, are sufficient to establish a *prima facie* case of total disability within the meaning of the Act.

As Mr. Macher's job with Jack Gray Transport required lifting 50 to 70 pounds and climbing, the weight of the medical evidence does not prove that he can return to that job. I recognize that in reaching this conclusion, I differ with Dr. Shea's opinion. I do so because it is obvious that he was not aware of what Mr. Macher's job really entailed from a physical standpoint. Thus, it now becomes the employer's responsibility to overcome the presumption of total disability.

In order to overcome the presumption of total disability, the employer must demonstrate the availability of employment that the claimant could perform. A showing of suitable alternate employment must account for a claimant's age, background, employment history, and physical and intellectual capabilities. *See Turner*, 661 F.2d 1042-43. In addition, such employment must be a position within the claimant's community that the claimant realistically could secure with a diligent effort. *Id.* While the employer need not specifically place the claimant in an actual job, it must establish the precise nature, terms and availability of the job opportunity. *Tarner*, 731 F.2d at 201; *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The presumption of total disability continues until the employer satisfies this burden.

Mr. Macher has been working in alternative employment since at least August of 1998. (ALJX 4). He has performed many jobs on a part-time basis in a light duty capacity since that time, which may constitute suitable alternate employment. *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985). If the claimant is performing such work satisfactorily and for pay, barring other signs of beneficence or extraordinary effort, it precludes an award of total disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Because Mr. Macher has been performing alternate employment in light duty positions since August of 1998, which is within the restrictions imposed by Dr. Ribaudo and has been doing so on a continuous basis, I find this proves that suitable alternate employment was available to him. Thus, I find that suitable alternate employment has been shown, making Mr. Macher's disability partial rather than total.

As the employer has paid temporary partial disability compensation through the end of August 1998, I find that the claimant is entitled to temporary partial disability compensation beginning on September 1, 1998. The parties disagree as to when the claimant reached maximum medical improvement. The claimant asserts that he reached the point of maximum medical improvement on June 11, 1999, while the employer argues that Mr. Macher had reached maximum medical improvement on September 28, 1998.

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under one standard, a disability is considered to be permanent where the underlying condition has reached the point of maximum medical improvement. *Trask*, 17 BRBS at 60. Under another standard, a permanent disability is one that "has continued for a lengthy period and . . . appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). These two standards, while distinguishable, both define the permanency of a disability in terms of the potential for further recovery from the injury. To establish permanency, the medical evidence must establish the date on which the employee has received the maximum medical benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985).

Dr. Ribaudo, who treated Mr. Macher on several occasions, stated that the claimant reached maximum medical improvement on June 11, 1999. However, Dr. Shea, who examined Mr. Macher on only one occasion, stated that the claimant was at maximum medical improvement on September 28, 1998. Dr. Shea indicated that he believed the claimant could have returned to his position as a crane operator on that date. He further indicated that he believed a crane operator job would involve sitting for eight hours with no breaks. Yet, he stated that even if the claimant were required to do crane maintenance which required bending and lifting, he still would place no restrictions on Mr. Macher. However, Dr. Shea admitted that he never learned exactly what tasks Mr. Macher was required to perform. In addition, Dr. Shea opined that although the claimant showed results which were less than normal on flexion tests, he believed the claimant's results were normal because he showed no signs of spasm during the tests.

I find the date of maximum medical improvement to be June 11, 1999 based upon the opinion of Dr. Ribaudo. As Dr. Ribaudo treated Mr. Macher on several occasions over a period of two years, I find that he is more likely to be familiar with the claimant's condition and hence, is entitled to greater weight than Dr. Shea, who merely examined Mr. Macher on one occasion. Moreover, Dr. Shea was not apprized of exactly what Mr. Macher's job required physically. Therefore, I find Dr. Ribaudo was in a better position to evaluate the claimant's physical condition.

Under the *Trask* standard, I find Mr. Macher's disability is permanent and has been since he reached maximum medical improvement on June 11, 1999. Therefore, I find Robert Macher was temporarily partially disabled from September 1, 1998 until June 11, 1999. On June 11, 1999, the date of maximum medical improvement, the character of the claimant's disability changed from temporary to permanent. Since he began working in suitable alternate employment in August of 1998 and the employer ceased payments for temporary partial disability at the end of August 1998, I find the extent of the claimant's disability changed at that time. Therefore, I find that September 1, 1998 is the date on which the claimant experienced a loss of wages and became temporarily partially disabled. On June 11, 1999, Mr. Macher reached maximum medical improvement and hence, as of this date, the claimant became permanently disabled and is entitled to permanent partial disability compensation under Section 8(c)(21) of the Act.

Compensation

Mr. Macher is entitled to temporary partial disability compensation under Section 8(e) of the Act from September 1, 1998, as the employer ceased compensation benefits as of that date. These benefits should continue through June 10, 1999, because I have concluded that Mr. Macher reached maximum medical improvement and his disability became permanent as of June 11. I further find that the claimant is entitled to continuing permanent partial disability payments under Section 8(c)(21) beginning on June 11, 1999.

Claimant's compensation under the Act under Section 8(e) is "two-thirds of the difference of the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment." 33 U.S.C. § 908(e). The claimant and employer agree that the claimant's average weekly wage at the time of injury was $1,721.26, but the maximum average weekly wage under the Act for that time period has been determined to be $1,253.65, resulting in a maximum compensation rate of $835.74 per week. (Tr. 18, ALJX 4, 6).
The claims adjuster for the employer/carrier and claimant's counsel apparently agreed on this compensation rate. Mr. Macher apparently was paid temporary partial disability compensation of $119.39 per day, based on a seven day week ($835.74 ÷ 7 = $119.39), for every day he failed to earn wages prior to September 1, 1998. (*See* CX 12, L3, p. 5).

While claimant's counsel is continuing to seek temporary partial disability compensation of $119.39 per day beginning on September 1, 1998 for every day on which Mr. Macher failed to work, I do not believe this method reflects the claimant's loss of wages as limited by the maximum allowable average weekly wage rate determined by the U.S. Department of Labor under Section 6(b)(3). Rather, I believe the temporary partial disability compensation in this case should be computed by taking the difference between the $1,253.65 maximum average weekly wage and the wages earned by Mr. Macher in alternate employment, then multiplying this difference by 66**b** percent to arrive at the claimant's allowable compensation. Utilizing the schedule set forth in the findings of fact regarding the compensation received by Mr. Macher between September 1, 1998 and June 7, 1999 (41 weeks), I find the claimant is entitled to temporary partial disability compensation under Section

8(e), totalling $23,660. This amount of compensation is computed based on the allowable maximum average weekly wage ($1,253.65) multiplied by the 41 weeks between September 1, 1998 and June 7, 1999, resulting in $51,399.65. From this amount, I subtracted the total compensation received by Mr. Macher during this time period ($15,908.45), then multiplied the remainder of $35,491.20 by the 66**b** percent provided in Section 8(e).

The same total compensation can be computed by dividing claimant's 41 weeks of work into his total earnings of $15,908.45 to arrive at an average weekly wage of $388.01, then subtracting this amount from the maximum average weekly wage of $1,253.65 as determined by DOL. The remainder of $865.64 is then multiplied by 66**b** percent, pursuant to Section 8(e), to obtain the claimant's weekly compensation rate under that section, $577.09. This amount multiplied by 41 weeks equals $23,660 of compensation. Actually, this results in slightly more compensation than that sought by claimant's counsel through his alternative computation of $119.39 for every day that the claimant failed to work. (CX 12, L1, p. 1).

I further find that Mr. Macher has not established a loss of wages on June 8, 9 and 10 because the evidence submitted regarding the wages earned by him on these days of work is illegible.

It would appear reasonable to apply the method used to compute compensation under Section 8(e) to also calculate the claimant's compensation under Section 8(c)(21). Both sections provide for compensation to be computed at the rate of 66**b** percent of the difference between a claimant's average weekly wage and his wage earning capacity. However, I am unable to do so because the wage records submitted by the claimant contain inconsistencies and are incomplete. Moreover, Mr. Macher earned wages exceeding the pertinent maximum average weekly wage as determined by DOL in some of the weeks between June of 1999 and May of 2000. Again, I do not believe the method suggested by claimant's counsel adequately reflects his client's loss of wages. Indeed, permanent partial disability compensation was sought by the claimant in July and November of 1999, although his wages for both months exceeded the monthly wages determined by applying the maximum average weekly wage that is allowed by DOL. I therefore believe that

additional factors should be reviewed to determine the claimant's loss of wage earning capacity beginning June 11, 1999.

According to Section 8(h), a claimant's wage-earning capacity under Section 8(c)(21) shall be determined on the basis of his actual earnings. However, where those earnings do not "fairly and reasonably represent the claimant's wage-earning capacity," a reasonable wage-earning capacity may be determined, with due consideration of "the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." 33 U.S.C. § 908(h). I believe this approach should be pursued in the absence of adequate documentation regarding Mr. Macher's wages after June 11, 1999.

The Benefits Review Board has held that in determining whether either the claimant's actual, post-injury wages or alternate wages fairly and reasonablely represent his true wage-earning capacity, additional factors must be considered. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). Such factors may include, but are not limited to, the claimant's medical disability, economic conditions, change in general wage levels, the claimant's age and training, number of hours worked, existence of a sympathetic employer or sympathetic co-workers, continuousness or permanence of post-injury employment, and opinions of vocational experts. *Id.* at 655-50. The objective of Section 8(h) is to determine the wages which the claimant would earn under normal conditions in the open labor market, taking his injury into consideration. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 109 (1991).

Neither the claimant nor the employer/carrier argue that the claimant's actual wages are not representative of his wage-earning capacity. However, the evidence regarding Mr. Macher's wages after June 11, 1999 is inadequate. I therefore look to his wages prior to June 11 to compute his permanent partial disability compensation.

The evidence summarized in the findings of fact indicate Mr. Macher was paid an average of $26.23 per hour in alternative employment between September 1, 1998 and June 7, 1999 ($15,908.45 ÷ 606½ hours). (CX 12, L22). Moreover, all of

the physicians, including Dr. Ribaudo, agree that Mr. Macher is able to work at least 40 hours in a light duty position. Dr. Ribaudo indicated that it was permissible for the claimant to work longer than an eight hour day. (CX 6, p. 24). In addition, the claimant even admits that his back pain does not prevent him from accepting alternative employment. (Tr. 59).

I find that, when considering the claimant's disability in addition to other factors, Mr. Macher could work 40 or more hours a week in alternative employment. I reach this conclusion although Mr. Macher generally testified that he has not turned down work since returning to light duty. Hence, multiplying his hourly wage of $26.23 per hour by 40 hours a week results in a wage-earning capacity of $1049.20 per week.

I reiterate that Section 8(c)(21) provides for permanent partial disability to be computed on the difference between the claimant's average weekly wage at the time of injury and the claimant's wage earning capacity. The maximum average weekly wage for purposes of this case is $1,253.65. The difference between this amount and the amount I found to be the claimant's weekly wage earning capacity, $1,049.20, is $204.45. The compensation allowable under Section 8(c)(21) is 66**b** percent of the difference of $204.45 or $136.30 per week. I find this is the amount of permanent partial disability compensation to which Mr. Macher is entitled under Section 8(c)(21) on a weekly basis beginning June 11, 1999.

I recognize the amount of compensation awarded to Mr. Macher for permanent partial disability under Section 8(c)(21) is less than that sought by the claimant. The amount, I believe, is reasonable, given the factors involved in this case, the most important of which is the lack of evidence proving his exact loss of wages. Moreover, this compensation rate will continue until the parties either reach a basis for settling this issue or seek a change in the compensation rate by filing a petition for modification with the district director.

In conclusion, Mr. Macher is entitled to temporary partial disability under Section 8(e) from September 1, 1998 through June 10, 1999, totalling $23,660.00. I further conclude that the claimant is entitled to permanent partial disability compensation under Section 8(c)(21) beginning on June 11, 1999 at the rate of $136.30 per week. As always, I

leave the exact computation of the compensation due Mr. Macher to the expertise of the district director.

Medical Expenses

Section 7(a) of the Act provides "[t]he employer shall furnish such medical, surgical and other attendants or treatment, nurse and hospital service, medicine, crutches and apparatus for such a period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In other words, the employer/carrier is responsible for reasonable, appropriate and necessary medical expenses relating to a claimant's work-related injury. Claimant's counsel has submitted in evidence numerous medical bills and expenses relating to his client's January 22, 1998 injury. While it is difficult to ascertain which of these expenses still remain in dispute, it appears the employer/carrier is not contesting this issue. Therefore, I find that the claimant is entitled to the payment or reimbursement of all reasonable and necessary medical expenses relating to the January 22, 1998 work-related injury while employed for Jack Gray Transport. (CX 13, M1-M7).

ORDER

Based on the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that Robert A. Macher is entitled to the compensation listed below as a result of the claim involved in this proceeding. The specific computations of the award and interest shall be administratively performed by the District Director.

1. Employer/carrier shall pay to Robert Macher compensation for temporary partial disability under Section 8(e) of the Act, totalling $23,660.00.

2. Employer/carrier shall pay to Robert Macher compensation for permanent partial disability under Sections 8(c)(21) and 8(h) of the Act at the rate of $136.30 per week from June 11, 1999.

3. Interest shall be paid on all accrued benefits in accordance with the rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until

paid. The appropriate rate shall be determined as of the filing date of this decision with the district director.

4. Employer/carrier shall furnish reasonable, appropriate and necessary medical care to Mr. Macher as required by Section 7 of the Act.

A
DONALD W. MOSSER
Administrative Law Judge